

**Statutory Supplement  
to  
Evidence: A Problem-Based and  
Comparative Approach**

**Third Edition**

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**On pages 138–139, replace the text of Rule 801 with the following:**

**Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

- (a) **Statement.** “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
- (b) **Declarant.** “Declarant” means the person who made the statement.
- (c) **Hearsay.** “Hearsay” means a statement that:
- (1) the declarant does not make while testifying at the current trial or hearing; and
  - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.
- (d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
- (1) ***A Declarant-Witness’s Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
    - (A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
    - (B) is consistent with the declarant’s testimony and is offered:
      - (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
      - (ii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground; or
    - (C) identifies a person as someone the declarant perceived earlier.
  - (2) ***An Opposing Party’s Statement.*** The statement is offered against an opposing party and:
    - (A) was made by the party in an individual or representative capacity;
    - (B) is one the party manifested that it adopted or believed to be true;
    - (C) was made by a person whom the party authorized to make a statement on the subject;
    - (D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or
    - (E) was made by the party’s coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

**On page 147, add the following at the end of Rule 801:**

ADVISORY COMMITTEE'S NOTE (2014 AMENDMENT)

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, “[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.”

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication o[r] improper influence or motive must have been made before the alleged fabrication or improper inf[lu]ence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

**On pages 149–153, replace the text of Rule 803 with the following:**

**Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness**

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will.
- (4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:
  - (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and
  - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.
- (5) ***Recorded Recollection.*** A record that:
  - (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
  - (B) was made or adopted by the witness when the matter was fresh in the witness’s memory; and
  - (C) accurately reflects the witness’s knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.
- (6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:
  - (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) ***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) ***Absence of a Public Record.*** Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

- (ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and
- (B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice—unless the court sets a different time for the notice or the objection.
- (11) ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.
- (12) ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate:
- (A) made by a person who is authorized by a religious organization or by law to perform the act certified;
  - (B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and
  - (C) purporting to have been issued at the time of the act or within a reasonable time after it.
- (13) ***Family Records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.
- (14) ***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if:
- (A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;
  - (B) the record is kept in a public office; and
  - (C) a statute authorizes recording documents of that kind in that office.
- (15) ***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

- (16) ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.
- (17) ***Market Reports and Similar Commercial Publications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.
- (18) ***Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet if:
- (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
  - (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

- (19) ***Reputation Concerning Personal or Family History.*** A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
- (20) ***Reputation Concerning Boundaries or General History.*** A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.
- (21) ***Reputation Concerning Character.*** A reputation among a person's associates or in the community concerning the person's character.
- (22) ***Judgment of a Previous Conviction.*** Evidence of a final judgment of conviction if:
- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
  - (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
  - (C) the evidence is admitted to prove any fact essential to the judgment; and
  - (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.



**(23) *Judgments Involving Personal, Family, or General History, or a Boundary.*** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

**(24) [*Other Exceptions.*]** [Transferred to Rule 807.]

**On page 173, add the following at the end of Rule 803:**

ADVISORY COMMITTEE’S NOTE (2013 AMENDMENT)

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a “notice-and-demand” procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

ADVISORY COMMITTEE’S NOTE (2014 AMENDMENT)

**Rule 803(6).** The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception—regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification—then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

**Rule 803(7).** The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception—set forth in Rule 803(6)—then the burden is on the opponent to show that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

**Rule 803(8).** The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception—prepared by a public office and setting out information as specified in the Rule—then the burden is on the opponent to show that the

source of information or other circumstances indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to “demonstrate why a time-tested and carefully considered presumption is not appropriate.” *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.